IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.11.2006

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Writ Petition No.11655 of 1999

1. Sudhir Singhi
2. Veena Singhi — Petitioners

v.

1. The Commercial Tax Officer,
   Adayar-1 Assessment Circle,
   No.46, Chamiers Road,
   R.A. Puram, Chennai 600 028.

2. The Commissioner,
   Commercial Taxes Department,
   Ezhilagam, Chepauk,
   Chennai 600 005.

3. State of Tamil Nadu,
   represented by the
   Secretary to Government,
   Commercial Taxes Department,
   Fort St. George,
   Chennai 600 009. — Respondents

Writ Petition filed under Article 226 of the Constitution of India for the issue of writ of certiorari calling for the records connected with the order No.RC.928/99/A3 dated 21.06.1999 of the first respondent and to quash the same.

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For Petitioners : Mrs.Meera Gupta for
M/s.Surana & Surana

For Respondents : Mrs.S.Anitha, Govt. Advocate (Taxes)

ORDER

This writ Petition is filed for the issue of writ of certiorari calling for the records connected with the order No.RC.928/99/A3 dated 21.06.1999 of the first respondent and to quash the same.

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2. One Saroja Babu was an assessee on the file of the Commercial Tax Officer, Adyar-1 Assessment circle, Chennai. For the assessment year 1987-88 to 1993-94 there was an arrears of sales tax from her. While that being so, on 24.06.1993 the said assessee sold the property in favour of her son in law, Jayaseelan. Thereafter, when proceedings were initiated to recover the sales tax, under the ground that statutory charge has been created over the property pursuant to the provisions under section 24(1) and (2) of the Tamil Nadu General Sales Tax Act, the assessee, who has sold the property to her son in law on 24.06.1993 filed a suit in O.S. No.2553 of 1994 challenging the action taken against the property of the assessee, which was sold in favour of the son in law on 24.06.1993. When the suit was pending before the Court, Jayaseelan, the son in law, sold the property in favour of the petitioners. Subsequently, the suit also came to be dismissed on 14.01.1999. In this factual matrix, the subsequent purchasers Sudir Singh and Veena Singh have filed the present writ petition seeking for the relief as stated above.

3. Learned counsel for the petitioners very strenuously contended that the petitioners are bona fide purchasers for valuable consideration without notice of the charge created over the property and the respondents authority cannot take any action in respect of the property. He relied on a decision of the Division Bench of this Court in the case of D.Senthil Kumar v. Commercial Tax Officer, (2006) 3 MLJ 1019, whereby the Court took into consideration the peculiar facts and circumstances of the case and held that the Commercial Tax Officer cannot create an encumbrance over the property of the defaulting company, in a case where the property has been sold in Court auction prior to creation of the charge and the auction purchasers are bona fide purchasers for value without notice of the charge.

4. The scope and ambit of section 24 of the Tamil Nadu General Sales Tax Act, which creates a charge has been considered by a Full Bench of this Court in the case of B.Suresh Chand v. State of Tamil Nadu, 2006(4) CTC 805, which is a case arising out of a properly laid out suit and culminated in Letters Patent Appeal No.100 of 1999, wherein the Full Bench of this Court, after taking into consideration of the specific provisions of the Tamil Nadu General Sales Tax Act, particularly sections 19, 24 (1) and 24(2), and also sections 100 of the Transfer of Property Act, has held as follows :

> " 23. ..... While sub-section(1) of Section 24 creates a 'charge' on the properties of a defaulter to the extent of his dues, sub-section (2) states that the dues will have priority over all other claims against those properties, except land revenue and claims of Land Development Bank in regard to property mortgaged to it.
>
> 24. The meaning of the term "charge on the property"

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is to be found in Section 100 of the Transfer of Property Act, in which it has been equated to a 'simple mortgage', and it has also been laid down therein that, in the absence of a specific provision in any law, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of a charge. Thus, while Section 24(1) of the Act gives the tax dues only the status of a simple mortgage over the properties of the defaulter, Section 24 (2) gives these dues a priority over all other claims against that property except claims for land revenue and of Land Development Bank.

25. A reading of Section 3 of the Transfer of Property Act, 1882 leads to the conclusion that, not only a wilful abstention from an enquiry which a person ought to have made, but the gross negligence to make enquiry also would amount to notice of a fact to him. When the prudence of a person requires him to make an enquiry, but due to his own negligence he failed to make enquiry, he falls in the category of a person, with notice. A purchaser of the property who claims the transaction to be bona fide without notice, the yardstick to be applied for the "notice" is given in Section 3 of the Transfer of Property Act, 1882 and only by the application of this provision, a purchaser who seeks protection is to be identified, whether he is a purchaser for value without notice. The necessity of the purchase, the intention of the transfer, the relationship between the vendee and vendor are all vital factors to find out the reasonableness of the person in purchasing the property. Sometimes unexplained secrecy or the haste in the transactions may also throw some light on the bona fides or mala fides. To decide whether a transaction was genuine or bona fide or mala fide, all facts relating to the conduct of the parties to the transaction have to be weighed as a whole.

26. The plaintiffs in this case have not disputed the liability of their vendors to pay the sales tax, even at the time of the sales, but claim protection under the exception clause, for which the parameters of Section 3 of the Transfer of Property Act 1882 have to be applied. Every purchaser from the assessee is naturally interested to protect the property and will claim to be a bonafide purchaser. For the sake of their claim, the Court cannot approve the transaction as a bonafide sale.

27. Under Section 101 of the Evidence Act, 1872 whoever desires any court to give judgment as to any legal right or liability depending on the existence of facts which he asserts, must prove, that those facts existed. Therefore, it is for him to establish that there was no

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wilful abstention of enquiry or search of the facts, on his part about the vendor before the sale transaction was completed.

28. In this context it will be useful to refer to Order 6 Rule 2 of C.P.C., which reads as follows:-

> "Order 6 Rule 2: Pleading to state material facts and not evidence. - (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved".

29. A reading of the above provisions show that the party must plead all material facts on which he means to rely at the trial. If any one of the material fact is omitted, the statement of claim is bad and it would mean no pleading and no cause of auction for the suit. If material facts are not pleaded, a court cannot permit evidence to be led. In 1977 (1) S.C.C. 511 (Udhav Singh Vs. Madhav Rao Scindia) the Supreme Court has defined the expression "material facts" in the following words:-

> "All the primary facts which must be proved at the trial by a party to establish the existence of a cause of auction or his defence are material facts".

30. The distinction between "material facts" and "particulars" cannot be overlooked. Material facts are primary and basic facts which must be pleaded by the party in support of the case set up by him, either to establish his cause of auction or defence. Since the object and purpose is to enable the opposite party to know the case he has to meet, in absence of pleading a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit. Particulars, on the other hand, are the details of the case. They amplify, refine and embellish material facts. They give the finishing touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative.

31. If in the light of the provisions contained in Order 6 Rule 2 (1) of C.P.C. the averments in the plaint are considered, it can easily be seen that all the primary facts which must be proved at the trial by the plaintiffs to establish their case that they are bona fide purchasers for value without notice have not been stated in the plaint. It is pertinent to point out at this juncture that nowhere in the plaint the plaintiffs pleaded that

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S.V.Traders, Kancheepuram was a proprietory concern and it was not a partnership firm. Likewise nowhere in the plaint it has been stated that the plaintiffs either enquired with their vendors or with the authorities of the sales tax department as to whether any sales tax arrears is due from their vendors."

5. Hence, the material facts regarding the purchase of the property by the petitioners without notice of the statutory charge created; establishing that the sale in favour of the vendor of the petitioners is not affected by non payment of tax as the relationship between the vendor of the petitioners and the original assessee being son in law and mother in law; the fact that even after the sale in favour of the son in law in 1993, the mother in law filed a suit to set aside the order made by the Commercial Tax Officer to recover the arrears of crown debt by bringing the property to sale over which the automatic charge is created, which is equivalent to the simple mortgage and when the suit was pending before the competent civil Court, the petitioners have purchased the property - are all matters which require letting in evidence and mere affidavit and counter affidavit are not sufficient to decide the issue. Hence, I am of the view that the Full Bench decision of this Court in the case of B.Suresh Chand v. State of Tamil Nadu, 2006(4) CTC 805, referred to supra, squarely covers the issue on hand. As already stated, that case also arises out of a common law proceedings by way of a suit and a letters patent appeal. The Division Bench decision in the case of D.Senthil Kumar v. CTO, (2006) 3 MLJ 1019 was rendered in circumstances where the property of the defaulting assessee has been brought to sale in a debt recovery proceedings for the loan obtained from the bank, when subsequent to the auction sale, the respondents sales tax authorities initiated proceedings. In those circumstances of the case, the Division Bench held that the Commercial Tax Officer cannot create an encumbrance over the property of the defaulting company in a case where the property was sold in Court auction prior to the creation of the charge and the auction purchasers are bona fide purchasers for value without notice of the charge, prior to transfer.

6. As rightly said by the Full Bench, a purchaser of the property, who claims the transaction to be bona fide without notice, the yardstick to be applied for the notice is given in section 3 of the Transfer of Property act, 1882 and only by the application of this provision, a purchaser who seeks protection is to be identified. Therefore, the petitioners have to atleast satisfy the Court by material evidence that they are bona fide purchasers for valuable consideration without notice of the charge created for non payment of the statutory dues.

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7. With the above observations, the writ petition is dismissed. The petitioners are at liberty to move the competent civil Court and 15 days' time from the date of receipt of a copy of this order is granted to the petitioners to move the Civil Court. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Commercial Tax Officer,
   Adayar-1 Assessment Circle,
   No.46, Chamiers Road,
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3. The Secretary to Government,
   Commercial Taxes Department,
   Fort St. George,
   Chennai 600 009.

+1cc to M/s. Surana & Surana, Advocates Sr 53160
+1cc to Spl. Govt. Pleader Sr 53401

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